Supreme Court, U.S.
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In The

Supreme Court of the United States

PITNEY BOWES INC.; PITNEY BOWES CREDIT CORP.,

Petitioners,

v.

H & D TIRE AND AUTOMOTIVE-HARDWARE, INC.; BEARD PLUMBING CO.; JONES & JONES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should federal courts apply the appropriate state law rather than federal common law to decide, for amount-in-controversy purposes in a diversity action, whether punitive damages represent a common and undivided interest sufficient to permit their aggregation across a class?

LIST OF PARTIES

The parties to the proceedings below were: (1) Petitioners Pitney Bowes Inc. and Pitney Bowes Credit Corp.; and (2) Respondents H & D Tire and Automotive-Hardware, Inc.; Beard Plumbing Co.; and Jones & Jones, Inc.

CORPORATE DISCLOSURE

Petitioner Pitney Bowes Inc. is a publicly traded corporation and there is no parent of the corporation or publicly held corporation owning ten-percent or more of the corporation's stock. Petitioner Pitney Bowes Credit Corp. is a wholly owned subsidiary of Pitney Bowes Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Pitney Bowes Inc. and Pitney Bowes Credit Corp. respectfully request that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported at 227 F.3d 326 (5th Cir. 2000) (App. 1-10) and 250 F.3d 302 (5th Cir. 2001) (App. 11-18).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 27, 2000. On April 30, 2001, the court issued a separate opinion denying the Petitioners' timely petitions for rehearing by the panel and hearing *en banc*. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1332(a) of title 28 of the United States Code, in effect as of February 1995, read in relevant part:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000,

exclusive of interest and costs, and is between – (1) citizens of different States . . . ."

STATEMENT OF THE CASE

Pitney Bowes Inc. manufactures and markets office equipment, including mailing equipment, and sells that equipment to Pitney Bowes Credit Corp., which then leases the equipment to customers. Respondents H & D Tire and Beard Plumbing Co. – two Texas businesses which lease this equipment – originally brought an action against Pitney Bowes Inc. and Pitney Bowes Credit Corp. (together, "Pitney Bowes") in February 1995, in state court in Texas, seeking to represent a purported class of Pitney Bowes's customers. Plaintiffs' allegations center on Pitney Bowes's pricing of replacement leases.

On August 10, 1995, Pitney Bowes removed this action from the state court in Texas on the basis of federal diversity jurisdiction. At the time of removal, section 1332 of title 28 of the United States Code required that the amount in controversy exceed $50,000. The plaintiffs moved to remand the matter to state court. Their motion to remand was denied on March 12, 1996.

Shortly after their motion to remand was denied, the plaintiffs moved to amend their complaint to add an additional class representative. The court granted the motion on May 22, 1996.

On September 16, 1996, the plaintiffs again moved to amend their complaint to add yet another class representative. In their amended complaint the plaintiffs affirmatively and unequivocally stated that, *"[t]his Court has*

jurisdiction of this action under 28 U.S.C. § 1332" (emphasis added). They also asserted "actual damages" not exceeding $30,000 for the named plaintiffs, plus punitive damages "in an amount to be determined at trial." The plaintiffs' second motion for leave to amend was granted on October 4, 1996.

After the plaintiffs amended their complaint, the parties and the federal court devoted substantial time and resources to resolving this matter. Extensive discovery was conducted, including class-related discovery. Hundreds of thousands of pages of documents were produced and over a dozen depositions were taken. The district court then held a class-certification hearing that included live testimony from fact and expert witnesses, and on October 9, 1997 the district court entered thirty-six pages of detailed findings of fact and conclusions of law denying the plaintiffs' motion for class certification.

Shortly after the district court's order denying the plaintiffs' motion for class certification, Pitney Bowes moved for summary judgment against the plaintiffs. The district court granted the motion and on March 5, 1999 entered judgment in favor of Pitney Bowes. The district court determined that the lease contracts' clear and unambiguous language both disclosed and permitted the very practices at issue in the litigation.

The plaintiffs filed a notice of appeal on April 5, 1999, appealing *only* from the order granting Pitney Bowes's motion for summary judgment. They declined to appeal from the order denying their motion for class certification, thereby waiving any right to seek certification of a class. That waiver, however, did not impact the court's

jurisdiction because jurisdiction had been proper at the time of removal, *see St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292-93 (1938), because jurisdiction was proper as to the plaintiffs' own claims, and because plaintiffs had unequivocally alleged jurisdiction in their second amended complaint.

Plaintiffs also declined to appeal from the order denying their motion to remand. Because the plaintiffs did not appeal from that order, the parties did not brief the issue of subject matter jurisdiction to the Fifth Circuit.

On September 27, 2000, nearly five years after the commencement of the case in Texas state court, the Fifth Circuit, *sua sponte*, raised the issue of subject matter jurisdiction and vacated the judgment that had been entered for Pitney Bowes. *H & D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326 (5th Cir. 2000) (App. 1-10). The panel ruled that the district court had lacked subject matter jurisdiction because the amount-in-controversy requirement of Section 1332 had not been met when the case was removed or at the time of judgment. (App. 10).

In its ruling the Fifth Circuit panel first considered whether the punitive damages of the individual, named plaintiffs were sufficient to meet the amount-in-controversy requirement. (App. 5). Noting the limited magnitude of each plaintiff's compensatory damages and the lack of any evidence supporting a high punitive damages award, the panel held that the amount-in-controversy requirement was not satisfied by the damages of any individual named plaintiff. (App. 5-6).

The panel next examined whether the punitive damages of the class could be aggregated and attributed *in*

toto to each plaintiff to meet the amount-in-controversy requirement. *Id.* Based on the record, the panel assumed for purposes of its analysis that if punitive damages were awarded to a class this size, they would exceed the jurisdictional limit. (App. 6 n.5). However, the panel decided that punitive damages could not be aggregated and attributed to each plaintiff. (App. 8). The panel's decision was not based on state law; rather, as a matter of federal law, the panel held that "the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying th[e] jurisdictional predicate." (App. 7, quoting *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593, 594 (5th Cir. 1978)).

Finally, the court explored whether the plaintiffs' claims for attorneys' fees fulfilled the amount-in-controversy requirement. (App. 8). Based solely on its application and interpretation of Connecticut's Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110g(d) (1992), the court "decline[d] to attribute the attorney's fees solely to the named plaintiffs to determine whether the amount in controversy is sufficient." (App. 9-10).

On April 30, 2001, the Fifth Circuit issued a new opinion and simultaneously denied Pitney Bowes's timely filed petitions for panel rehearing and rehearing *en banc*. The panel noted that it would have required aggregation to sustain removal. (App. 13). It then restated the law in the Fifth Circuit regarding aggregation: damages of individual class members (including punitive damages) cannot be aggregated across the class. (App. 14). It observed that a different Fifth Circuit panel's determination in *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995) to aggregate punitive damages across the class was

not inconsistent because that decision was based on Mississippi state law. (App. 14). Finally, the panel pointed to the pleadings and disclaimers of plaintiffs that their own damages, and those of absent class members, would never exceed the jurisdictional threshold. (App. 15).

Pursuant to Pitney Bowes's petition for rehearing *en banc*, at least one active judge requested a poll of the court. But because a majority of active members did not vote in favor of *en banc* review, the petition was denied. (App. 18).

SUMMARY OF ARGUMENT

The Court should grant certiorari to answer the question whether state law or federal common law determines if punitive damages should be aggregated across the class for purposes of quantifying the jurisdictional amount in a diversity case. This Court has previously held that "determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case." *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-53 (1962). But the Court has not decided how it will apply its aggregation doctrine to state law punitive damage claims.

Under the Court's long-established aggregation doctrine – a federal standard for determining the value of the matter in controversy – claims may be aggregated across the class when the damages at issue are common and

undivided for all the class members, and are not based upon individualized calculations of damages. *Snyder v. Harris*, 394 U.S. 332, 336 (1969). Here, the Fifth Circuit panel correctly looked to that standard as a framework for its analysis in deciding whether punitive damages may be aggregated. But instead of looking to state law on the nature and extent of punitive damages in deciding whether punitive damages represent a common and undivided interest, the panel in this case incorrectly created its own federal common law to prohibit aggregation of punitive damages.

The Court has not yet determined how *Horton* interacts with the aggregation doctrine in deciding whether punitive damages fall within the category of common and undivided damages. As a result, the circuit courts have, to date, applied inconsistent methodologies for determining whether punitive damages should be aggregated. As the number of class actions brought in state court has grown, these differing methodologies have led to inconsistent results and unnecessary jurisdictional jockeying. The confusion is particularly evident when the plaintiff class members are from multiple states, such that different states' laws may apply to different plaintiffs' claims, or when the plaintiffs' claims vary, such that some will be viewed as common while others will be viewed as individualized.

This Court should find that, under *Horton*, state law must ultimately determine whether punitive damages represent a common and undivided interest for aggregation purposes. It should therefore remand this case, instructing the court below to consider whether under

applicable state law punitive damages represent a "common and undivided interest." Further, in applying state law the lower court should be directed to take into account the prevailing law among the states which recognizes that (i) punitive damages are generally designed to serve a collective or common societal interest in punishing and deterring wrong-doers, (ii) in a class context one generally looks to the conduct of the defendant without regard to the particular loss suffered by an individual class member to decide whether to award punitive damages; and (iii) it is generally immaterial to a defendant how punitive damages are to be apportioned.

REASONS FOR GRANTING THE PETITION

I. There is a Conflict Among the Circuits Warranting This Court's Consideration of Whether State Punitive Damages Law Should Be Applied to Determine Whether Punitive Damages Represent a Common and Undivided Interest Under the Aggregation Doctrine.

This case involves an important question of federal law in regard to which one United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter. The Court should therefore exercise its discretion and review the matter on a writ of certiorari. *See* SUP. CT. R. 10(a).

The doctrine implicated in this conflict is commonly known as the "aggregation doctrine." The aggregation doctrine is a federal judicial doctrine. It is based on "this Court's interpretation of the statutory phrase 'matter in

controversy[,]' " which is found in section 1332(a) of title 28 of the United States Code, the statute dealing with federal diversity jurisdiction. *Snyder*, 394 U.S. at 336. Under the doctrine, plaintiffs with separate and distinct claims cannot aggregate those claims to meet the minimum amount in controversy and establish diversity jurisdiction under 28 U.S.C. § 1332. *Id.* at 335.

There is, however, a well-recognized exception to the doctrine which permits aggregation for plaintiffs who "unite to enforce a single title or right in which they have a common and undivided interest." *Id.* This exception was described by the Court as early as 1891. *Clay v. Field*, 138 U.S. 464 (1891) ("if several persons be joined in a suit . . . and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction. . . . ").

Based on the exception for common and undivided interests, this Court has permitted the aggregation of compensatory damages in numerous cases. *E.g., Shields v. Thomas*, 58 U.S. (17 How.) 3 (1832) (distributees of an estate); *Texas & P. Ry. Co. v. Gentry*, 163 U.S. 353 (1896) (beneficiaries under wrongful death statute); and *Troy Bank of Troy, Indiana v. G.A. Whitehead & Co.*, 222 U.S. 39 (1911) (holders of vendors' liens in same property).

To date, however, the Court has never considered the issue of whether punitive damages fall within the exception and may therefore be aggregated. As a result there is a void in the aggregation doctrine that the circuit courts have filled inconsistently:

> [T]he Supreme Court has not yet determined whether the punitive damages claimed by multiple plaintiffs can be aggregated. Therefore, because the lower courts have failed to render consistent opinions on this issue, it remains to be seen whether or not they will adhere to the traditional rule, or perhaps, develop another one.

Jessica Dominguez, *Aggregation of Punitive Damages*, 1 J. Legal Advoc. & Prac. 230, 233 (1999).

The question of whether the punitive damages sought in a class action may be aggregated involves determining whether the punitive damages sought on behalf of the class "can be attributed *in toto* to each and every putative class member so that they can individually satisfy the requisite amount in controversy, a requirement mandated by *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)." *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073 (11th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 381 (2000). If the total punitive damages cannot be aggregated and attributed *in toto* to each class member, then they must be allocated *pro rata* among the members and each member must satisfy the jurisdictional amount. *Id.*

Five circuits have taken three different approaches in deciding whether punitive damages can be aggregated for amount-in-controversy purposes. These differences in approach among the circuits have been noted by the Fifth Circuit in *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 600 (5th Cir. 1998), by the Second Circuit in *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1428-31 (2nd Cir. 1997), and by federal district courts. One district court even observed, "The problem [in determining whether to

allow aggregation of punitive damages has resulted in] confusion among the circuits, within the circuits, and, consequently, across the board with all districts." *ABS Ins. Ltd. v. National Union Fire Ins. Co.*, 51 F. Supp. 2d 762, 768 (E.D. Tex. 1999) (citing cases). A uniform approach to determining whether and when punitive damages may be aggregated is therefore demanded.

The Fifth Circuit historically looked to the nature of punitive damages under state law to determine whether punitive damages are common and undivided, and therefore aggregable under the exception articulated in *Snyder*. *See, e.g., Ard*, 138 F.3d at 602 (holding that punitive damages are not aggregable under Louisiana law); *Allen*, 63 F.3d at 1333-34 (holding that punitive damages are aggregable under Mississippi law); *Lindsey*, 576 F.2d 593 (until opinion in this case, historically viewed as applying Alabama law and holding that punitive damages are not aggregable). In the instant case, however, the Fifth Circuit departed from that approach in its attempt to reconcile *Lindsey, Allen* and *Ard*.

To begin with, the Fifth Circuit made clear that it was basing its decision in this case entirely on *Lindsey*, which had ultimately held that punitive damages are not aggregable across the class. (App. 8) ("Because *Lindsey* is the earliest, and thus controlling, decision in this circuit [to address the issue], the punitive damages claims of the putative class cannot be aggregated. . . . "). The court also clarified its ruling in *Lindsey*, stating that *Lindsey* "did not rely on a characterization of punitive damages under Alabama law. . . . " (App. 7). Instead, it was based purely "on the principle that 'the claims of several plaintiffs,

suing as members of a class, cannot be aggregated for the purpose of satisfying th[e] jurisdictional predicate.' " *Id.* (citing *Lindsey*, 576 F.2d at 594; *Snyder*, 394 U.S. 332). Thus, as a result of the panel's decision in this case, it is now the law in the Fifth Circuit that (i) the controlling precedent on whether to aggregate punitive damages is *Lindsey*, (ii) *Lindsey* is not based on state law, and (iii) the Fifth Circuit applies federal common law holding that "damages of individual class members cannot be aggregated across the class." (App. 13-14).

In contrast, the Eleventh Circuit looks to state law, although it too relies on *Lindsey* (a pre-split case) to so hold. In *Cohen v. Office Depot*, 204 F.3d at 1075, the Eleventh Circuit applied Florida law to find that punitive damages should not be aggregated.[1] It reached this conclusion by finding that the Florida law at issue was similar to the Alabama punitive damages law interpreted in *Lindsey*. The Eleventh Circuit has similarly interpreted other states' punitive damages law by reference to the Fifth Circuit's analysis of Alabama law in *Lindsey*. *See, e.g., Kirkland v. Midland Mort. Co.*, 243 F.3d 1277, 1281 (11th Cir. 2001) (holding that "the nature of punitive damages under Oklahoma law is not materially different

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[1] In so holding, the Eleventh Circuit overruled its earlier decision in *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). *Tapscott* (a post-split case) had held that in a class action lawsuit punitive damages may be aggregated where state law provides that an award of punitive damages is for the public or collective good, and the award would reflect the wrongfulness of the defendant's conduct as a whole. *Id.* at 1358-59. (The court's abrogation of *Tapscott* was based on its belated consideration of the precedential import of *Lindsey*.)

from that in Alabama, Florida, and Georgia."); *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 757 (11th Cir. 2000) (holding that punitive damages are not aggregable under Alabama law); *Cohen*, 204 F.3d at 1075 (holding that punitive damages are not aggregable under Florida punitive damages law since it is similar to Alabama punitive damages law).

The Second and Tenth Circuits employ a third approach. They look to the nature of the underlying compensatory claims and do not analyze the state's laws on the punitive damage claim. *See Gilman*, 104 F.3d at 1428-31; *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292-93 (10th Cir. 2001). If the underlying claim is common and undivided, so are punitive damages; if the underlying claim is separate and distinct, so are punitive damages. *See Gilman*, 104 F.3d at 1430. Thus, unlike the Eleventh Circuit, these circuits do not "allow the aggregation issue to turn on the nature of punitive damages under state law[.]" *Id.* at 1431.

Consequently, in determining the very same issue – whether punitive damages represent a common and undivided interest such that they may be aggregated for amount-in-controversy purposes – the circuits have created three different methodologies. The Fifth Circuit applies federal common law, the Eleventh Circuit applies state punitive damages law, and the Second and Tenth Circuits look to the nature of the underlying compensatory claims without consulting state punitive damages

law.[2] Unquestionably, the circuits are in disarray on this important issue of federal diversity jurisdiction.

II. The Question of Whether State Punitive Damages Law Should Be Applied to Determine Whether Punitive Damages Represent a Common and Undivided Interest Under the Aggregation Doctrine Is An Important Issue of Federal Law Which This Court Has Not Yet Decided.

This case also involves an important question of federal law that has not been, but should be, settled by this Court. The Court should therefore exercise its discretion and review the matter on a writ of certiorari. *See* SUP. CT. R. 10(c).

This case presents the Court with an ideal opportunity to finally consider whether the aggregation doctrine, articulated in *Snyder*, requires application of state law to determine whether punitive damages represent a common and undivided interest. First, as the Court has held, the test for when to aggregate is presently one of federal law involving this Court's interpretation of the diversity jurisdiction statute. *Snyder*, 394 U.S. at 336. Second, the panel below based its punitive damages aggregation ruling solely on the controlling case of *Lindsey*, a

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[2] The Seventh Circuit also held that punitive damages are not to be aggregated under any circumstances, but did so without pointing to any authority in support of its position. *See Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000). The court stated that the idea that "punitive damages should be aggregated for purposes of determining the amount in controversy clashes with established rules," yet failed to cite to any such rules. *Id.*

case which was itself based on federal law, not state law. (See App. 7-8) (indicating that Fifth Circuit's earlier ruling in *Lindsey* did not "rely on a characterization of punitive damages under [state] law. . . . "). And third, based on the record before it, the Fifth Circuit panel in this case assumed for purposes of its aggregation analysis that if punitive damages were awarded to the putative class, they would exceed the jurisdictional limit. (App. 6 n.5). Thus, the instant petition places the issue of aggregation of punitive damages in a putative class action squarely before this Court.

In class actions the stakes are often high, and the boundaries of state and federal jurisdiction are of paramount importance to the court and the parties. When a putative class action, such as this one, is removed on diversity jurisdiction grounds, the question of whether the parties are diverse is usually readily determinable. *See, e.g., Gilman,* 104 F.3d at 1421 (diverse citizenship uncontested). But the question of whether a sufficient amount is in controversy is often hotly contested. *Id.* (sole jurisdictional issue is amount in controversy). Carefully-crafted pleadings and damage-limiting disclaimers have become the norm as plaintiffs attempt to render their national class actions "removal-proof." *See Davis v. Carl Cannon Chevrolet-Olds, Inc.,* 182 F.3d 792, 798 (11th Cir. 1998) ("The case at hand is but one example of a growing trend in class action litigation in this country. Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting the language in

the petitions or complaints in order to avoid the amount-in-controversy requirement of the federal courts.").

Often, as is the case here, at the center of this jurisdictional tug-of-war is an argument regarding whether the court should aggregate punitive damages across the class when determining if the jurisdictional requisite has been met. In order to readily ascertain the amount in controversy, courts and parties in class actions must be guided by clear rules on the issue of aggregation as it applies to punitive damages. As detailed above, however, the lower courts have exhibited confusion and employed various approaches regarding whether punitive damages can be aggregated to meet the minimum amount in controversy. Without intervention from this Court, lower courts will continue to act in a disparate manner when faced with this question, resulting in a confusing morass of methodologies that undermine the correctness of jurisdiction.

The continuing silence of this Court on the issue of aggregation of punitive damages is having costly ramifications, this case being a prime example. Certainty of subject matter jurisdiction is not merely a worthy goal; it is a practical imperative that is only amplified in such lengthy, complex class actions. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). As long as entire matters are litigated to their conclusion only to be sent back to state court after a different opinion from the appellate court, as was the case here, the price of jurisdictional uncertainty is too high. It is therefore imperative that there exist a uniform approach to deciding the amount in controversy in diversity jurisdiction matters where aggregation of punitive damages is determinative of federal jurisdiction.

III. The Conflict Among the Circuits Should be Reconciled and this Important Question of Federal Law Settled in Favor of a State Law Approach to Aggregation of Punitive Damages in National Class Actions.

The starting point for reconciling the circuit conflict and settling the punitive damage aggregation issue should be *Horton*, which advises that the issue is one to be decided under a federal standard that applies state law to determine the right to be enforced. *Horton*, 367 U.S. at 352-53. *Snyder* articulates the federal standard by setting out the "common and undivided interest" test for whether to aggregate. But the *Snyder* standard – i.e., the aggregation doctrine – does not itself determine the nature and extent of punitive damages, or whether they represent a "common and undivided interest." The real question that remains, therefore, is how should courts apply the *Snyder* test in a punitive damages context in light of *Horton*? What law should federal courts apply to determine whether the "common and undivided interest" exception is met, particularly when a class seeks punitive damages while asserting state law claims, as in the case below? Should federal courts determine as a matter of their own judicial interpretation of 28 U.S.C. § 1332(a) whether punitive damages represent a common and undivided interest? Or should they rely on one or more state's punitive damages laws? And if state law applies, which state(s)? It is time for this Court to reconcile the conflict and articulate a unifying approach on how to determine whether punitive damages satisfy the "common and undivided interest" test.

As this Court has held, the test for when and how to aggregate is presently one of federal judicial interpretation involving this Court's interpretation of the diversity jurisdiction statute. *Snyder*, 394 U.S. at 336. In other words, establishing the standard to be applied when interpreting the jurisdictional phrase "matter in controversy" as it appears in a federal statute is properly the domain of the federal judiciary. But the law which finally determines whether that standard has been met must ultimately emanate from the states, including the choice of which state's laws to apply. *See Horton*, 367 U.S. at 352-53; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The Court should therefore reject the approach that the Fifth Circuit utilized in this case. By holding that no state's law is part of the analysis, the Fifth Circuit's approach failed to recognize that the determination necessarily implicates state law. *See Horton*, 367 U.S. at 352-53 ("determination of the value of the matter in controversy for the purposes of federal jurisdiction is a question to be decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case."). The appropriate method for deciding if punitive damages represent a common and undivided interest for aggregation purposes must ultimately be grounded in state law.

The first part of any such state-law-based approach must involve the question of what state's laws to apply. In a federal diversity case the forum state's choice of laws principles determine that issue. *Klaxon Co.*, 313 U.S. 487. Here that means Texas, which applies the most significant

relationship test under Section 6 of the Restatement (Second) of Conflict of Laws. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

Under Section 6, the following factors apply:

a) the needs of the interstate . . . [system];

b) the relevant policies of the forum;

c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

d) the protection of justified expectations;

e) the basic policies underlying the particular field of law;

f) certainty, predictability and uniformity of result; and

g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6.

In this case, these factors may have led to a number of possible outcomes as to which state's laws will apply to the punitive damages aggregation question. *See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 597 F. Supp. 934 (D.D.C. 1984) ("When the primary purpose of a rule of law is to deter or punish conduct, the states with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of defendant are located."). But that is for the lower court to decide.

The second and most critical aspect of such a state-law-based inquiry involves whether, under applicable

state law, punitive damages represent a common and undivided interest. Again, this is for the lower court to determine based on its choice of law. But there are several abiding qualities of punitive damages common to nearly all states that may ultimately streamline its inquiry. These qualities favor aggregation because they emphasize the common and undivided nature of punitive damages.[3]

For example, in contrast to compensatory damages, which serve solely to compensate each plaintiff for that particular plaintiff's injury, punitive damages are generally designed to serve a collective or common societal interest in punishing and deterring wrongdoers. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Further, punitive damages require only evidence of the defendants' wrongdoing, as opposed to evidence relevant to each individual. *Allen*, 63 F.3d at 1334 (recovery of punitive damages in class action not affected by failure of individual claims, as long as some plaintiff recovers). As such, they are generally considered common and undivided. *See* Christopher J. Willis, *Aggregation of Punitive Damages In Diversity Cases: Will The Real Amount In Controversy Please Stand Up?*, 30 Loy. L. Rev. 775, 791 (1997). Finally, it

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[3] In Connecticut, common law punitive damages are generally limited to the plaintiffs' costs of litigation, including attorneys' fees, and possess a quasi-compensatory character. *Waterbury Petroleum Prods., Inc. v. Canaan Oil & Fuel Co.*, 477 A.2d 988, 1004 (Conn. 1984). In the instant case, however, the plaintiffs have chosen to pursue their attorneys' fees as a common fund. In a declaration filed with the district court they "disclaimed any claim for attorney fees on behalf of any individual class member, in favor of a common fund rather than the Connecticut statute. . . . " (App. 15).

is generally immaterial to a defendant how punitive damages are to be apportioned; any dispute on apportionment is among the plaintiffs. *Shields*, 58 U.S. (17 How.) at 5; *Berman v. Narragansett Racing Assoc.*, 414 F.2d 311, 313 (1st Cir. 1969).

If courts must consider these qualities of punitive damages under state law, then they will likely permit the aggregation of punitive damages. *See Allen*, 63 F.3d at 1333-34; *Tapscott*, 77 F.3d at 1359. Although the Eleventh Circuit has recently not permitted such aggregation, those opinions do not actually analyze the state law at issue. Rather, they simply compare the punitive damage law in one state to the Alabama law that would have applied in the *Lindsey* case. *See Kirkland*, 243 F.3d at 1281 (comparing Georgia law to Alabama law); *Cohen*, 204 F.3d at 1075 (comparing Florida law to Alabama law). But as the Fifth Circuit has now made clear, the *Lindsey* case, upon which the Eleventh Circuit relies, did not cite to state law nor was it based on state law.

As the foregoing demonstrates, the laws of the various states appear to favor aggregation because of the manner in which they construe punitive damages. This Court should therefore remand this case and direct that the court below apply state law (using appropriate choice of law principles) to determine the issue of whether to aggregate punitive damages for amount-in-controversy purposes under 28 U.S.C. § 1332(a). Further, in applying state law the lower court should be directed to take into account the prevailing law among the states that

recognizes the common and undivided nature of punitive damages.

CONCLUSION

Whether punitive damages are aggregable or not in a nationwide class action can determine jurisdiction, but the basis for answering the question varies from circuit to circuit. The current confusion in the law leaves parties not knowing whether a case is sustainable in federal court. As a result, cases like this one can be litigated to their conclusion in federal court only to be sent back to state court after a conflicting determination. This massive waste of resources negatively affects the parties and the judiciary. Especially in light of the growing trend toward filing "removal-proof" class actions in state court, the question of whether state or federal law determines when punitive damages represent a common and undivided interest is ripe for this Court's consideration.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40430

H & D TIRE AND AUTOMOTIVE-HARDWARE, INC., ET AL.,

Plaintiffs,

H & D TIRE AND AUTOMOTIVE-HARDWARE, INC.; BEARD PLUMBING CO.; JONES & JONES, INC.,

Plaintiffs-Appellants

versus

PITNEY BOWES INC., ET AL.,

Defendants,

PITNEY BOWES INC.; PITNEY BOWES CREDIT CORP.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(Filed Sept. 27, 2000)

Before POLITZ, GIBSON,* and HIGGINBOTHAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

H & D Tire and Automotive-Hardware, Inc., Beard Plumbing Co., and Jones & Jones, Inc. appeal the district

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* Circuit Judge of the Eighth Circuit, sitting by designation.

court's grant of summary judgment to Pitney Bowes Inc. and Pitney Bowes Credit Corp. (collectively, Pitney Bowes). We conclude that the court did not have jurisdiction over this case because the amount in controversy requirement was not satisfied. We therefore vacate the district court's judgment and instruct it to remand this case to the state court in which it was initially filed.

Pitney Bowes Inc. markets a variety of mailing equipment and other office equipment and sells it to Pitney Bowes Credit Corp., which then leases the equipment to customers. The plaintiffs entered into leases with Pitney Bowes. Representatives of Pitney Bowes contacted the plaintiffs before their original leases expired and offered them the opportunity to upgrade their mailing equipment. The plaintiffs then entered into the replacement leases that are the subject of this suit.

H & D Tire and Beard Plumbing brought an action in Texas state court, seeking to represent a class of Pitney Bowes customers.[1] They alleged that Pitney Bowes overcharged customers who entered into replacement leases by impermissibly including a trade-up component in the calculation of lease payments. They claimed that individual actual damages would not exceed $30,000 and sought an unspecified amount of punitive damages and attorneys' fees.

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[1] After the case was removed to federal court, H & D Tire and Beard Plumbing's First Amended Complaint added Jones & Jones as a plaintiff.

Pitney Bowes invoked federal diversity jurisdiction and removed the case to the Eastern District of Texas. It argued that the jurisdictional amount was satisfied in any of three ways: (1) by adding each plaintiff's requested actual damages to its punitive damages; (2) by aggregating the punitive damages claims of the class and attributing the amount to each plaintiff; or (3) by adding the claim for attorneys' fees to the named plaintiffs' claims.

H & D Tire and Beard Plumbing moved to remand the case to state court, arguing that Pitney Bowes had not established the required amount in controversy.[2] The district court referred the motion to a magistrate judge, who found that punitive damages could be aggregated and recommended denial of the motion. The court followed the recommendation and denied the motion to remand. The district court later denied class certification and granted Pitney Bowes's motion for summary judgment. On appeal, the plaintiffs challenge only the grant of summary judgment. They do not appeal the denial of class certification or the denial of their motion to remand to state court.

We have a duty to raise the issue of subject matter jurisdiction sua sponte. *See Christoff v. Bergeron Indus., Inc.*, 748 F. 2d 297, 298 (5th Cir. 1984). We must determine

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[2] When a case is removed and the complaint does not allege a specific amount of damages, the defendant must prove by a preponderance of the evidence that the amount in controversy requirement is met. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993).

whether the district court would have had original jurisdiction had the case been filed there. *See* 28 U.S.C. § 1441(a) (1994).

Even if a court lacks jurisdiction at the time of removal and regardless of whether there was an objection to the removal, the judgment will stand if the court had jurisdiction at the time it entered judgment. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64, 73 (1996); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 700 (1972). If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot stand. "Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated." *Caterpillar*, 519 U.S. at 76-77 (emphasis in original).

Diversity jurisdiction exists if the amount in controversy requirement is satisfied and there is diversity of citizenship between the plaintiffs and defendants. *See* 28 U.S.C. § 1332(a) (1994). Diversity of citizenship is not at issue here; our only concern is whether the amount in controversy is sufficient.[3] At the relevant time, the amount in controversy had to exceed $50,000. *See id.*

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[3] The district court's denial of class certification is not relevant to our analysis. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292-93 (1938) (if district court had jurisdiction at time of removal, subsequent event that decreases amount in controversy does not defeat jurisdiction).

I.

We first consider whether the plaintiffs' individual actual damages plus individual punitive damages exceed $50,000. In their state court petition, H & D Tire and Beard Plumbing alleged that their individual claims for actual damages would not exceed $30,000. They also sought an unspecified amount of punitive damages. Because it is not facially apparent from the complaint that the jurisdictional amount is satisfied, we will look elsewhere in the record to determine the amount in controversy. *Cf. St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).

According to documents filed with the plaintiffs' response to Pitney Bowes's motion for summary judgment,[4] H & D Tire, Beard Plumbing, and Jones & Jones have actual damages claims of no more than $72, $254, and $990, respectively. These amounts are substantially less than the ceiling of $30,000 set forth in the state court petition. There is no evidence that any member of the putative class would have had a claim for significantly greater actual damages. In fact, the plaintiffs' reply to Pitney Bowes's brief opposing class certification indicates that a typical class member's claim would be less than $200. There is no evidence of conduct by Pitney Bowes that would support punitive damages awards equal to

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[4] These documents, which are appended to an affidavit from an attorney for the plaintiffs, include copies of the replacement leases executed by H & D Tire and Jones & Jones and a copy of a Pitney Bowes internal worksheet for Beard Plumbing's lease.

roughly 50 to 690 times actual damages, the amount necessary to bring the total damages above the statutory minimum. Accordingly, the amount in controversy requirement is not satisfied by the damages of any individual plaintiff.

II.

We next consider whether the punitive damages of the class can be aggregated and attributed to each plaintiff to meet the amount in controversy requirement.[5] Our earlier decisions seem to conflict on this issue.

In *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978), we held that the district court did not have subject matter jurisdiction over a removed class action where the plaintiff requested $2000 in compensatory damages and $1 million in exemplary damages on behalf of the class. The complaint did not allege the number of class members, and thus we could not mathematically ascertain the amount in controversy for each member. *See id.* at 595. Implicit in this reasoning is that a claim for punitive damages must be allocated pro rata among class members to determine whether the jurisdictional requirement is met. Otherwise, the number of members would have been irrelevant, the district court would have had jurisdiction, and removal would have been appropriate.

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[5] Although the plaintiffs did not request a specific amount of punitive damages in their state court petition, they did allege that the class contained "thousands of persons and entities." For purposes of our analysis, we assume that if punitive damages were awarded to a class this size, they would exceed $50,000.

We later addressed a nearly identical issue in a case brought jointly by 512 plaintiffs for damages related to an explosion. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1329 (5th Cir. 1995). We held that the full amount of alleged punitive damages must be counted against each plaintiff to determine the amount in controversy because punitive damages, under Mississippi law, are fundamentally collective. *See id.* at 1333. *Lindsey*'s reasoning did not rely on a characterization of punitive damages under Alabama law, but was instead based on the principle that "the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying th[e] jurisdictional predicate." *Lindsey*, 576 F.2d at 594 (citing *Snyder v. Harris*, 394 U.S. 332 (1969)).

After *Allen* was decided, we followed *Lindsey* and held that punitive damages should not be aggregated and attributed to each plaintiff for purposes of determining the amount in controversy. *See Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998).[6] *See also Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (holding that *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), which considered a class claim for punitive damages in the aggregate, was inconsistent with *Lindsey*; because the court was bound by *Lindsey*, it divided a $10 million claim for punitive damages among 39,000 class members and held that the amount in controversy requirement was not met), *petition for cert. filed*, No. 00-246 (U.S. Aug. 14, 2000).

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[6] When the magistrate judge concluded that punitive damages could be aggregated and recommended denial of the plaintiffs' motion to remand, *Ard* had not yet been decided.

When panel opinions appear to conflict, we are bound to follow the earlier opinion. *See Harvey v. Blake*, 913 F.2d 226, 228 n.2 (5th Cir. 1990). Because *Lindsey* is the earliest, and thus controlling, decision in this circuit, the punitive damages claims of the putative class cannot be aggregated and attributed to each plaintiff to meet the jurisdictional requirement.

III.

We turn now to whether the plaintiffs' claim for attorneys' fees fulfills the amount in controversy requirement. When a statutory cause of action entitles a party to receive attorneys' fees, the amount in controversy includes those fees. *See Graham v. Henegar*, 640 F.2d 732, 736 (5th Cir. Unit A Mar. 1981). If the statute awards attorneys' fees to the named plaintiffs in a class action, the fees are attributed solely to the class representatives. *See Free v. Abbott Lab. (In re Abbott Lab.)*, 51 F.3d 524, 526-27 (5th Cir. 1995), *aff'd by an equally divided Court*, 120 S. Ct. 1578 (2000). The plaintiffs in *Abbott Laboratories* brought an antitrust class action under Louisiana law and alleged $20,000 in actual damages. Because a state statute provided that attorneys' fees would be awarded to the "representative parties" in a class action, the attorneys' fees increased the amount in controversy so that the claims of the named plaintiffs satisfied the jurisdictional amount. *See id.*

Here, the plaintiffs sought attorneys' fees under the Connecticut Unfair Trade Practices Act, which provides:

> In any action brought by a person under this section, the court may award, to the plaintiff, in

> addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees.

Conn. Gen. Stat. Ann. § 42-110g(d) (West 1992). The use of the word "plaintiff" in this statute does not dictate that any fee award must be attributed solely to the representative party in a class action.[7] The fee award could also be attributed to the plaintiff class as a whole and therefore allocated pro rata among its members for purposes of determining the amount in controversy. *Cf. Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (attorneys' fees cannot be aggregated to reach jurisdictional amount).

Because the Connecticut statute does not specifically provide that attorneys' fees are awarded to the class representatives, we decline to attribute the attorneys' fees solely to the named plaintiffs to determine whether the

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[7] Until 1976, a court could award attorneys' fees to either the plaintiff or the defendant under this statute; an amendment substituted the words "the plaintiff" for "either party" that year. *See* Conn. Gen. Stat. Ann. § 42-110g (West 1992) (historical and statutory notes); *Staehle v. Michael's Garage, Inc.*, 646 A.2d 888, 890-91 n.8 (Conn. App. Ct. 1994). Presumably, the Connecticut legislature wanted to limit awards of attorneys' fees to the side bringing the action, but that does not indicate that the change was intended to limit the award of attorneys' fees to the named representatives in a class action.

amount in controversy is sufficient. *Compare Abbott Lab.*, 51 F.3d at 526-27, *with Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 & n.11 (11th Cir. 2000) (finding no basis for attributing award of attorneys' fees to class representative where statutes award fees to "prevailing party" or "[a]ny person prevailing"), *petition for cert. filed*, No. 00-246 (U.S. Aug. 14, 2000), *and Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 758 & n.4 (11th Cir. 2000) (declining to aggregate attorneys' fees for jurisdictional purposes where statute entitled "any person who is injured" to attorneys' fees).

* * *

Because the amount in controversy requirement was not fulfilled when Pitney Bowes removed this case or at the time of judgment, the district court did not have jurisdiction. We vacate its judgment and instruct it to remand this case to the state court in which it was initially filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40430

H & D TIRE AND AUTOMOTIVE-HARDWARE INC., ET AL.	Plaintiffs,
H & D TIRE AND AUTOMOTIVE-HARDWARE INC.; BEARD PLUMBING CO.; JONES AND JONES, INC.,	Plaintiffs-Appellants
	versus
PITNEY BOWES INC., ET AL.,	Defendants,
PITNEY BOWES INC.; PITNEY BOWES CREDIT CORP.,	Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

(Filed Apr. 30, 2001)

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion September 27, 2000, 5th Cir. 2000, ___ F.3d ___)

Before POLITZ, GIBSON,* and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Pitney Bowes moved for panel rehearing and rehearing en banc, following our decision to vacate this case for

* Circuit Judge of the Eighth Circuit, sitting by designation.

lack of jurisdiction.[1] We remain convinced that the federal courts have no jurisdiction over this case.

It began in a Texas state court in February of 1995. Plaintiffs, H&D Tire, Beard, and Jones & Jones, sued on behalf of a class of persons allegedly the victims of certain unauthorized charges Pitney Bowes made when plaintiffs traded up from one piece of leased equipment to another.

In their state court petition, plaintiffs alleged that their individual damages from the trade-up charges "would not exceed $30,000." They also alleged, following Texas practice, that their damages exceeded "the minimum jurisdictional limits" of the state court. The plaintiffs also requested punitive damages and attorneys' fees. Pitney Bowes removed the case to federal court in August of 1995. In its removal petition, Pitney Bowes alleged that: the amount in controversy would exceed $50,000 (then the jurisdictional minimum for diversity jurisdiction), that "[p]resumably plaintiffs will seek substantial punitive damages based upon [Pitney Bowes'] asserted wealth," and that punitive damages could be aggregated across the class to satisfy the jurisdictional amount.

Plaintiffs moved for remand and supported their motion with a declaration stating that each plaintiff's individual claim "does not, never did and never will exceed the sum or value of $50,000," which calculation included "any claim for actual, exemplary or other damages." This reaffirmed their earlier binding responses to

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[1] *See H&D Tire and Automotive Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326 (5th Cir. 2000).

discovery requests filed in state court, which denied that any individual claim exceeded $50,000. The motion to remand was referred to a magistrate, who determined that punitive damages could be aggregated across a class for purposes of computing the jurisdictional amount. He therefore found that the jurisdictional amount was met. The district court adopted that recommendation and denied the motion to remand.

In October of 1997 the district court denied class certification. In its Findings of Fact, the district court found that H&D Tire's trade-up charge was $72, that Beard's was $254, and that Jones & Jones's was $990. After fourteen months of inactivity, the district court ultimately granted Pitney Bowes summary judgment. Plaintiffs appealed. On appeal, we determined that federal subject matter jurisdiction was lacking because aggregation of punitive damages was improper, and absent aggregation the amount in controversy was not met, either on removal or when judgment was entered in federal court. We vacated and remanded to the district court with instructions to remand to state court for lack of jurisdiction.

We would not vacate if jurisdiction were present either at the time of removal or at the time of judgment.[2] In this case, however, the amount in controversy requirement was not met at either time.

Aggregation was the only basis for sustaining removal in the face of the capped claims on behalf of individuals. Yet damages of individual class members

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[2] *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75-78 (1996).

cannot be aggregated across a class. That is the law of the Fifth Circuit, even as regards punitive damages. The case relied on by Pitney Bowes, *Allen v. R&H Oil & Gas Co.*,[3] is not to the contrary. *Allen* was limited – by the panel that decided it – to the unique circumstances of Mississippi law,[4] and has no application here. We cannot "interpret" Rule 23 of the Federal Rules of Civil Procedure to alter the settled rule that distinct claims cannot be aggregated to meet the amount in controversy requirement. Nor have we been pointed to controlling law establishing that, in claiming punitive damages, class members were seeking "to enforce a single title or right in which they have a common and undivided interest."[5] As Justice Black explains in *Snyder*:

> To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. . . . If there is a present need to expand the jurisdiction . . . we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.[6]

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[3] 63 F.3d 1326, 1329 (5th Cir. 1995).

[4] *See Allen v. R&H Oil & Gas Co.*, 70 F.3d 26 (5th Cir. 1995) (per curiam) ("[T]he panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state.").

[5] *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

[6] *Id.* at 339-42.

Some may chafe under this fundamental brought forward by Justice Black. It remains sound, however ambitious and immodest of judicial powers one's view might be.

No individual class member stated a claim approaching the jurisdictional requirement, then $50,000. The three named plaintiffs affirmatively documented their damages as $72, $254, and $990 respectively, and the district court found those damages as a fact. Pitney Bowes does not challenge these numbers. As we explained, attorneys for the plaintiffs stated in a declaration filed with the district court[7] that the amount in controversy for any individual plaintiff "does not, never did, and never will exceed the sum or value of $50,000, exclusive of interest and costs. This includes any claim for actual, exemplary or other damages." The plaintiffs further disclaimed any claim for attorney fees on behalf of any individual class member, in favor of a common fund rather than the Connecticut statute: As Pitney Bowes described plaintiffs' claim in its

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[7] This declaration paralleled plaintiffs' judicially binding responses to interrogatories and requests for admission in state court. As we have held, "[w]hen specifically contested in a motion to remand, bare allegations by the removing party (much less statements in passing) have been held insufficient to invest a federal court with jurisdiction." *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566 (5th Cir. 1993) (Garwood, J.). Even if plaintiffs' state court pleadings left jurisdiction ambiguous, a post-removal affidavit violates no principle of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). We make that plain in Dow Quimica, explaining that "under those circumstances, the court is still examining the jurisdictional facts as of the time the case is removed, but the court is considering information submitted after removal." *Dow Quimica*, 988 F.2d at 565.

Brief in Support of Removal, "[f]ees in a common fund case are extracted from the class damage recovery, rather than obtained from the losing party." Defendant's only answer to the disclaimer was that "prevailing plaintiffs have the statutory means of shifting the costs of attorney fees to the CUTPA defendant." This is meritless. Defendant argued to the district court that plaintiffs' efforts to limit the amount claimed on behalf of any class member were sufficiently ambiguous that their pleadings should be ignored. As we explain, even if plaintiffs' pre-removal responses were ambiguous, the disclaimers are clear and speak to the claim at the time of removal.[8]

The amount in controversy requirement was not satisfied at the time of judgment for the same reason. Of course the amount in controversy could only be satisfied if at least one of the named plaintiffs claimed damages in

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[8] In response to requests for admission in state court, plaintiffs pleaded "Plaintiff denies that Plaintiff is seeking attorney fees [on behalf of individual class members] in this case." They swore that "plaintiffs' counsel will request the court to award attorney fees to plaintiffs' counsel pursuant to the common fund doctrine." Later, in support of the motion to remand, plaintiffs' counsel stated "under penalty of perjury on behalf of each of the Plaintiffs, I hereby confirm and stipulate that the Plaintiffs are not seeking attorneys' fees in this case and that Plaintiff's counsel will request the Court to award attorneys' fees to Plaintiff's counsel pursuant to the common fund doctrine." We remain persuaded that if attorneys fees for individual members were claimed (contrary to the plaintiffs' pleadings), to a legal certainty attorneys fees approaching $50,000 for each of the claims was not reasonable. We need not rest there given the explicit sworn disclaimer of plaintiffs' counsel, clarifying any ambiguity in the state court pleadings.

excess of $50,000. Yet the plaintiffs affirmatively disclaimed any such claim, and documented their actual damages as less than $1,000 each.

Defendants point to sections of the plaintiffs' complaint that alleges damages that exceed "the minimum jurisdictional limits of this court."[9] This ignores the fact that damages as claimed by the class and damages claimed by individuals who were class members were pleaded in separate parts of each of the amended complaints. Specifically, the provisions of the complaint relied upon by defendants claim damages on behalf of the individual plaintiffs *and* the plaintiff class. These allegations will not support jurisdiction because, as we have explained, the claimed damages cannot be aggregated across a class. In the separate section of each of their amended complaints in which individual claims were asserted, the plaintiffs alleged that "individual actual damages would not exceed $30,000." This pleading is not sufficient to confer federal jurisdiction, and here these

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[9] In *Asociacion Nacional de Pescadores*, 988 F.2d at 564 n.4, in rejecting a similar argument, we observed regarding state pleadings in a remand case: "The statement in their petition that '[d]amages far exceed the minimum jurisdictional limits of this court' furnishes no basis for that inference. The minimum amount in controversy for Texas district courts, although not entirely clear following recent constitutional and statutory changes . . . is certainly no more than $500. . . . Moreover, the claims of all plaintiffs are aggregated in determining whether this requirement is met." (citations omitted).

separate pleadings are reinforced by the explicit disclaimer of any damages exceeding that amount on behalf of any class member.[10]

It is ordered that the petition for rehearing is DENIED.

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Motion for Rehearing En Banc is DENIED.

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[10] See *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277 (1936) (holding that a general averment that damages will exceed the jurisdictional requirement is sufficient *unless* the complaint contains other averments which "qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint"); Charles Alan Wright, *Law of Federal Courts* 479 (5th ed. 1994) ("[A]n allegation that the matter in controversy exceeds, exclusive of interest and costs, the sum of $50,000 (or whatever other sum a particular statute may require) is sufficient unless the other allegations of the complaint show that less than that amount is involved.").